

June 1985

National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association

Susan Marie Kozik

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

Susan M. Kozik, *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma and University of Georgia Athletic Association*, 61 Chi.-Kent L. Rev. 593 (1985).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol61/iss3/5>

This Notes is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.

*NATIONAL COLLEGIATE ATHLETIC ASSOCIATION v. BOARD
OF REGENTS OF THE UNIVERSITY OF OKLAHOMA
AND UNIVERSITY OF GEORGIA ATHLETIC
ASSOCIATION*

104 S. Ct. 2948 (1984)

SUSAN MARIE KOZIK*

Section 1 of the Sherman Antitrust Act¹ prohibits restraints of trade that unreasonably restrict competition.² Two modes of analysis,³ the "Rule of Reason"⁴ and the "*per se* rule"⁵ have been developed by courts to determine whether a restraint of trade is unreasonable under the Act. The Supreme Court, in *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*,⁶ appears to have continued to narrow the distinction between the two modes of analysis; thereby making it difficult to anticipate which rule will be utilized in a particular situation. This comment will focus on the Supreme Court's antitrust analysis and will establish that the Court has continued the trend of merging the Rule of Reason and the *per se* rule.

ANTITRUST ANALYSIS: A HISTORICAL PERSPECTIVE

The Rule of Reason is deemed "the traditional framework of analy-

* B.S. Journalism, University of Illinois, Urbana, 1981; candidate for J.D., IIT Chicago-Kent College of Law, January 1986

1. The Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1982).

2. The Supreme Court has repeatedly held that Section 1 prohibits only unreasonable restraints of trade. See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342-43 (1982); *National Soc'y of Professional Engrs. v. United States*, 435 U.S. 679, 687-90 (1978); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 38 (1911).

3. In characterizing the modes of analysis, the Supreme Court has stated:

In the first category there are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are illegal '*per se*'. In the second category there are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.

National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 692 (1978).

4. The Court first articulated the Rule of Reason in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). See *infra* notes 8-18 and accompanying text.

5. See *infra* notes 19-26 and accompanying text.

6. 104 S. Ct. 2948 (1984).

sis" under Section 1 of the Sherman Antitrust Act.⁷ The Supreme Court first announced the rule in *Standard Oil Co. v. United States*,⁸ where it held that the Sherman Act outlawed only unreasonable restraints of trade.⁹ In *Standard Oil*, the Court held that although the business practices employed by the oil company appeared to be competitive and a restraint of trade,¹⁰ Congress did not intend to outlaw all restraints of trade, only those which failed to pass under "the standard of reason".¹¹

The parameters of the Rule of Reason were articulated seven years later by the Supreme Court in *Chicago Board of Trade v. United States*.¹² The Court in that decision stated that a restraint is reasonable if it merely regulates and thereby promotes rather than inhibits competition.¹³ In order to determine this, courts must consider factors such as the peculiar characteristics of the business in which the restraint is imposed, the condition of the market before imposition of the restraint, the nature of the restraint's effect, the reason for adopting the restraint and the purpose to be attained by the restraint.¹⁴

The broad scope of the Rule of Reason analysis as articulated in *Chicago Board of Trade* has been narrowed in recent years by the Court which limited the basic inquiry under the Rule.¹⁵ In its decision of *National Society of Professional Engineers v. United States*,¹⁶ the Court

7. *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36, 49 (1977).

8. 221 U.S. 1 (1911).

9. In *Standard Oil*, the Standard Oil Company of New Jersey and forty other defendants, including 33 corporations and John D. Rockefeller, were accused of conspiring to restrain and monopolize trade and commerce in oil and other petroleum products. On appeal, the defendants argued that their business practices, which appeared to be anticompetitive, actually served to increase the production of petroleum products, thereby lowering the price and bestowing a benefit upon the public. 221 U.S. at 75. See also Kintner, 1 FEDERAL ANTITRUST LAW § 8.2 (1980).

10. 221 U.S. at 75.

11. As the *Standard Oil* court noted:

[Section 1 of the Act] necessarily called for the exercise of judgment which required that some standard should be resorted to for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated. Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at the common law and in this country in dealing with subjects of the character embraced by the statute was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided.

221 U.S. at 60.

12. 246 U.S. 231 (1918).

13. *Id.* at 238.

14. *Id.*

15. In *Continental T.V. Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977), the Court stated that under the Rule of Reason, c all facts and circumstances must be weighed in determining whether a restrictive practice imposes an unreasonable restraint upon competition. *Id.* at 49. The test in *Continental T.V.* has been subsequently narrowed. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

16. 435 U.S. 679 (1978).

stated that the inquiry under the Rule of Reason is not merely whether a restraint is reasonable in a particular context, but rather, the inquiry is limited to whether the restraint is one which enhances competition or suppresses competition.¹⁷ The inquiry therefore is limited to the market impact of the practice on competition, which is determined by the practice's effect upon a relevant market.¹⁸

In contrast to the Rule of Reason, courts deem certain types of contracts and marketing arrangements *per se* unreasonable as a matter of law in order to simplify and expedite antitrust analysis under the Sherman Act.¹⁹ Among the categories of restraints deemed to be a *per se* violation of the Sherman Act are horizontal price fixing,²⁰ bid rigging and market division,²¹ vertical price fixing,²² group boycotts,²³ and tying arrange-

17. *Id.* at 691. See also Antitrust Law Developments (Second), American Bar Association, p. 20-21 (1984), for a good discussion on the development of analysis under the Rule of Reason.

18. A market has both product and geographic dimensions. See Antitrust Law Developments (Second), *supra* note 17 at 17. At this point, it is important to note a related argument called the single entity defense which has been raised many times in situations which are similar to that in *NCAA v. Board of Regents*. The Sherman Antitrust Act does not apply to single entities. *North Am. Soccer League v. National Football League*, 505 F. Supp. 659 (S.D.N.Y. 1980), *aff'd in part, rev'd in part*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari) (single entity defense raised against antitrust challenge to NFL rule prohibiting NFL owners from owning a team in another sport); *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 484 F. Supp. 1274 (C.D. Cal. 1980), *rev'd on other grounds*, 634 F.2d 1197 (9th Cir. 1980) (single entity defense used against an antitrust challenge to a NFL rule which required approval of three-fourths of NFL owners before moving franchise); see Blecher, Daniels, *Professional Sports and the Single Entity Defense Under Section One of the Sherman Act*, 4 WHITTIER L. REV. 217 (1982).

19. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984) (exclusive contract between hospital and anesthesiologists). See also *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (agreement between medical society and doctors); *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977) (franchising agreement between manufacturers and television set retailers); *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977) (credit arrangement with prefabricated housing manufacturer); *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495 (1969) (credit arrangement with prefabricated housing manufacturer); *White Motor Co. v. United States*, 372 U.S. 253, 262 (1963) (distributorship agreement); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (preferential routing clause in deeds and leases); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (newspaper advertising arrangement); *Standard Oil Co. v. United States*, 337 U.S. 293 (1949) (exclusive gasoline, oil and auto supply contracts).

20. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (agreement fixed doctors' fees); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (agreement between beer retailers only to sell upon advance payment or on delivery); *Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, Inc.*, 340 U.S. 211 (1951) (liquor distiller's agreement to fix maximum resale price); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (gasoline and oil sales and purchases in spot markets); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927) (agreement to set price between bathroom fixture manufacturers).

21. *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (exclusive dealing contract of cooperative buying association); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (bedding manufacturer's licensing arrangement and territory division); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (territorial market divisions with foreign manufacturers).

22. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) (manufacturer's territorial limitations and distribution scheme); *White Motor Co. v. United States*, 372 U.S. 253 (1963) (dealer distributorship agreements restricting geographic territory).

ments.²⁴ The roots of the *per se* analysis are also grounded in *Standard Oil Co. v. United States*,²⁵ in which the Court recognized that certain agreements, such as rate fixing agreements, ended any further inquiry under the Rule of Reason. Those arrangements gave rise to "a conclusive presumption which brings them [the agreements] within the statute."²⁶

In the past five years, the distinction between the Rule of Reason analysis and the *per se* analysis appears to have become blurred. In 1979, the Court expanded the inquiry under the *per se* rule in its decision in *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*²⁷ In *Broadcast Music*, a television network brought suit against a licensing agency for composers, writers and publishers.²⁸ The network argued that the agency's licensing arrangement amounted to a form of price fixing which was a *per se* violation under the Sherman Act.²⁹

The Court held that although "price fixing" is generally considered a *per se* violation of the Sherman Act, analysis under that doctrine must go beyond the face of the alleged anticompetitive practice.³⁰ The Court stated that the inquiry must focus on whether the effect and the practice facially threaten the "proper operation of our predominantly free-market economy."³¹ In a footnote,³² the Court stated:

[T]he scrutiny occasionally required under [the *per se* rule] must not merely subsume the burdensome analysis required under the Rule of Reason, or else we should apply the Rule of Reason from the start.

23. *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (collaborative effort against minority of dealers); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (concerted refusal to deal with appliance dealer by manufacturers and distributors).

24. *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958) (preferential routing clauses in railroad deeds and leases); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) (tying arrangement found where newspaper required advertisers to buy equal space in morning and evening newspapers).

25. 221 U.S. 1 (1911).

26. 221 U.S. 1 at 65. The *per se* doctrine was expressly adopted by the Court in 1927, in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). In *Trenton Potteries*, the defendants, a group of bathroom and lavatory ceramics manufacturers, argued that an alleged price fixing scheme did not constitute a violation of the Sherman Act, unless it could be found that interstate commerce was unreasonably restrained by the Act. *Id.* at 397. Even though the scheme itself was reasonable, its restraint effect upon competition was not. The Court reasoned that although a price fixing agreement was reasonably exercised, the effect was to eliminate competition which was a goal inherently contradictory to the policies of the Sherman Act. *Id.* at 397-98.

27. 441 U.S. 1 (1979).

28. The network argued that Broadcast Music Inc. violated antitrust laws by setting up and receiving fees for a blanket licensing arrangement which allowed broadcasters to play copyrighted musical compositions. 441 U.S. at 10.

29. *Id.* at 6.

30. *Id.* at 19-20.

31. *Id.* at 19.

32. *Id.* at 20, n. 33.

That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint.³³

While the Court's decision in *Broadcast Music* served to ease the harshness of antitrust analysis under the *per se* rule,³⁴ its decision in *Arizona v. Maricopa County Medical Society*³⁵ appeared to narrow the application of the Rule of Reason analysis.³⁶ In its decision, the Court stated that *per se* rules were in effect a short cut; they were developed to eliminate unnecessary investigation of business practices in areas in which the court has experience with the particular restraint involved that would lead it to conclusively presume a restraint was unreasonable under the Rule of Reason.³⁷ However, the Court stated that while *per se* analysis was often convenient, its application was not always symmetrical.³⁸ For the sake of business certainty and litigation efficiency, the Court said that it tolerated the invalidation of some agreements that a fullblown inquiry might have proved to be reasonable.³⁹ Therefore, it appears that the decision in *Arizona v. Maricopa County* failed to clarify when additional evidence was necessary under either mode of analysis to determine whether a practice violated the antitrust laws.

The distinction between the Rule of Reason and the *per se* rule grew even murkier after the recent Court decision in *Jefferson Parish Hospital District No. 2 v. Hyde*.⁴⁰ In that case, the Supreme Court reversed a court of appeals ruling which held that an exclusive contract between a hospital and a firm of anesthesiologists was a *per se* violation of Section 1 of the Sherman Act.⁴¹ In deciding that the controversial tying arrangement did not constitute a *per se* antitrust violation, the Court stated that although a *per se* analysis was sometimes appropriate, there were situations in which a more detailed analysis was necessary.⁴²

33. See *National Soc'y. of Professional Eng'rs v. United States*, 435 U.S. 679, 690-92 (1978).

34. See *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 443 U.S. 36 (1977).

35. 457 U.S. 332 (1982).

36. This case involved an antitrust challenge to a medical society which set the maximum fees that doctors in the society could charge patients covered under particular insurance plans. The Court held that the fee schedule amounted to a price fixing arrangement which was unlawful *per se* under the Sherman Act, and that no additional investigation need be made into the facts and circumstances under which the plan was developed. 457 U.S. 357.

37. 457 U.S. at 342-43.

38. *Id.* at 344-45.

39. *Id.* at 345.

40. 104 S. Ct. 1551 (1984).

41. *Id.* at 1554.

42. The Court stated, "[A]pplication of the *per se* rule focuses on the probability of anticompetitive consequences. Of course, as a threshold matter there must be a substantial potential for impact on competition in order to justify *per se* condemnation." *Id.* at 1560. The Court then said that only after this threshold question was answered in the affirmative, can a *per se* rule be applied if an anticompetitive effect is likely. *Id.*

The Supreme Court decided *Jefferson Parish Hospital* only a few months⁴³ before its decision in *NCAA v. Board of Regents*. In *NCAA v. Board of Regents*, the Court continued the trend of expanding analysis under the *per se* rule while constricting the inquiry required under the Rule of Reason.

THE FACTS OF THE CASE

The National Collegiate Athletic Association (NCAA) is a non-profit, voluntary consortium of approximately 850 colleges and universities.⁴⁴ Since its inception in 1905, the NCAA has promulgated and enforced playing rules, standards of amateurism and eligibility, and regulations concerning recruitment procedures, team composition and coaching staff size.⁴⁵ Since 1951, the NCAA has also regulated the broadcasting of football games on television.⁴⁶

In 1981, the NCAA entered into an agreement with the American Broadcasting Company (ABC) and the Columbia Broadcasting System (CBS) whereby each network would be granted exclusive carrying rights of NCAA football games⁴⁷ for the 1982 through 1985 football seasons. In return, each network agreed to pay the participating teams a "minimum aggregate compensation" which totaled \$131,750,000.00 over the four year period.⁴⁸ While the NCAA set a recommended fee for each type of game broadcast,⁴⁹ each member school was authorized to negoti-

43. The Court decided *Jefferson Parish Hosp.* on March 27, 1984. The Court's decision in *NCAA v. Board of Regents* was announced on June 27, 1984.

44. The purpose of the NCAA, as stated in its by-laws, is to maintain a "clear line of demarcation between college athletics and professional sports" by ensuring that student athletics remain an integral part of the overall educational program. NCAA CONST., art. II, § 2(a). The NCAA, through its control of intercollegiate sports seeks to maintain amateurism and promote the use of athletics as a tool to further the educational and social development of students. See Note, *Tackling Intercollegiate Athletics, An Antitrust Analysis*, 87 YALE L.J. 655, 657 n.9 (1978).

45. National Collegiate Athletic Ass'n. v. Board of Regents of the Univ. of Okla., 104 S. Ct. 2948, 2954 (1984) [hereinafter cited as *NCAA v. Board of Regents*].

46. The 1951 plan provided that only one game a week could be broadcast in each region, with a total blackout on 3 of 10 Saturdays during the season. A team could only appear on television twice. The purpose of the plan was to protect live attendance at college football games and diminish television's adverse impact upon college athletics. See Note, *Tackling Intercollegiate Athletics, An Antitrust Analysis*, *supra* note 44. See also Garrett and Hochberg, *Sports Broadcasting and the Law*, 59 IND. L.J. 155 (1984).

47. The NCAA also granted exclusive cable broadcasting rights to Turner Broadcasting Systems, Inc. The minimum aggregate fee for the first two years of this contract was \$17,696,000.00. *NCAA v. Board of Regents*, 104 S. Ct. at 2956, n.9, citing Board of Regents of the University of Okla. v. National Collegiate Athletic Ass'n., 546 F. Supp. 1276, 1291-92 (W.D. Okla. 1982).

48. Under this arrangement, national telecasts were the most valuable, regional telecasts less valuable, and Division II and Division III games commanding even a lower price. The prices reflected the relative number of viewers for each type of game broadcast. *NCAA v. Board of Regents*, 104 S. Ct. at 2956.

49. *Id.* Also of interest is the fact that Division II and Division III institutions were allowed

ate directly with the networks for the right to televise its games. In addition, the NCAA plan limited the number of television appearances each football team could make during the four-year period.⁵⁰

The University of Oklahoma and the University of Georgia along with other NCAA members formed a group called the College Football Association (CFA)⁵¹ and sought to negotiate their own television broadcasting package with the National Broadcasting Company (NBC).⁵² The contract which CFA signed with NBC in 1981 gave those teams in the CFA more television exposure than the NCAA plan and also increased the anticipated compensation the teams were to receive.⁵³ The NCAA threatened to impose sanctions upon the CFA teams if they proceeded with their separate agreement with NBC.⁵⁴ In response, the Board of Regents of the University of Oklahoma and the University of Georgia Athletic Association⁵⁵ sought an injunction against the NCAA that would prevent it from taking disciplinary action or interfering with the CFA's performance under the NBC contract.⁵⁶ A preliminary injunction was subsequently granted.⁵⁷

The district court, after a full trial, held that the NCAA violated Sections 1 and 2⁵⁸ of the Sherman Antitrust Act in its regulation of televised football broadcast rights.⁵⁹ The district court found that the agree-

complete freedom to broadcast their games, with the limitation that the games, could not appear on more than five stations without permission of the NCAA. *Id.* at 2956, n.8.

50. NCAA v. Board of Regents, 104 S. Ct. at 2957. The four-year plan was split into two two-year periods. The networks were under contract to provide coverage of at least 82 different universities during each two-year period. In addition, no member institution was allowed to appear more than six times (four times nationally) and the appearances had to be divided equally among the two networks. *Id.*

51. The CFA consists of 63 NCAA member universities and colleges. Board of Regents v. NCAA, 546 F. Supp. 1276, 1285 (W.D. Okla. 1982).

52. NCAA v. Board of Regents, 104 S. Ct. at 2957.

53. *Id.*

54. *Id.* The threatened sanctions not only applied to football but extended to other sports as well.

55. The University of Oklahoma and the University of Georgia both have a long history of having powerful (and popular) football teams. Both teams have also been highly ranked. Board of Regents v. NCAA, 546 F. Supp. 1296, 1282 (W.D. Okla. 1982).

56. See NCAA v. Board of Regents, 104 S. Ct. at 2957.

57. Board of Regents v. NCAA, 546 F. Supp. 1276 (W.D. Okla. 1982).

58. For the text of Section 1, see *supra* note 1. Section 2 of the Sherman Antitrust Act prohibits the formation of monopolies:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the Court.

15 U.S.C. § 2 (1982). The Court of Appeals and the Supreme Court in *NCAA v. Board of Regents* found it unnecessary to discuss this issue.

59. Board of Regents v. NCAA, 546 F. Supp. at 1301-28.

ment between the NCAA and the networks restrained the relevant market⁶⁰ in three ways: 1) the NCAA plan fixed prices for telecasts; 2) the exclusive network contract amounted to a boycott of all other broadcasters and the threatened sanctions amounted to a threatened boycott of potential competitors; and 3) the plan placed an artificial limit on the number of televised college football games.⁶¹ The district court rejected the NCAA's contentions that the plan's television policies protected the gate attendance of its members, preserved a competitive balance between the member schools and was therefore a justifiable restraint of trade.⁶²

The court of appeals affirmed the lower court's decision,⁶³ however, it rejected its boycott holding.⁶⁴ The court found that the NCAA's television plan was not procompetitive, despite the proffered justifications.⁶⁵ The court rejected the argument that the television plan promoted live attendance because it found that an increase in live attendance reduced television viewership, thereby causing a decrease in output and was, therefore, noncompetitive.⁶⁶ The court also rejected the argument that the plan was reasonable because its purpose was to balance athletic competition between schools.⁶⁷ The court held that this goal was inherently contradictory to the Sherman Antitrust Act's policy of encouraging and not inhibiting competition.⁶⁸

The court of appeals also held that the NCAA's television plan was illegal *per se* because it entirely eliminated competition between "producers" of televised college football games.⁶⁹ It summarily rejected the NCAA's argument that the plan was competitively justified because of the need to effectively compete against other types of television programming and entertainment.⁷⁰ The court further stated that even if the plan was not illegal *per se* under the Sherman Act, the plan's limitations on

60. The district court defined the relevant market as "live college football television" because the court determined that alternative programming had a significantly different audience and appeal. *Id.* at 1297-1300. The definition of the relevant market has an important significance upon the application of antitrust laws in this particular case. See *infra* notes 116-122 and accompanying text.

61. Board of Regents v. NCAA, 546 F. Supp. at 1293-95.

62. *Id.* at 1295-96.

63. Board of Regents of the Univ. of Okla. v. National Collegiate Athletic Ass'n., 707 F.2d 1147 (10th Cir. 1983).

64. *Id.* at 1160-61.

65. *Id.* at 1159-60.

66. *Id.* at 1153-54.

67. *Id.* at 1154.

68. *Id.* The court held that this argument amounted to the contention that "competition will destroy the market" which is contradictory to the goal of the Sherman Act, which is to encourage competition. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 696 (1978).

69. Board of Regents v. NCAA, 707 F.2d at 1155-56.

70. *Id.* at 1160.

price and output were not justified by any procompetitive purpose even when taking the totality of the circumstances into consideration.⁷¹ The NCAA subsequently appealed the circuit court's ruling, and the Supreme Court granted certiorari.⁷²

THE COURT'S DECISION: *NCAA v. BOARD OF REGENTS*

Before determining whether the NCAA's television plan violated the Sherman Antitrust Act,⁷³ the Court first decided which test to employ in its examination of the NCAA's plan. The Court found, as had the district court, that the NCAA plan created among member institutions a horizontal restraint that controlled the way in which they could compete with one another.⁷⁴ Although the Court recognized that such a horizontal restraint, which included an element of price fixing,⁷⁵ was generally illegal *per se*, the Court determined that the *per se* antitrust analysis was inappropriate in this case because the restraints on competition were necessary if the product, televised college football, was to be available at all.⁷⁶

The Court reinforced its decision to apply the Rule of Reason by stating that because the product, college football, was unique in that it was identified with an academic tradition, some regulations and agreements among the individual competitors were necessary in order to preserve the integrity of the product.⁷⁷ By promulgating rules and

71. The case was remanded to district court for appropriate modification of the injunction. *Id.* at 1162.

72. National Collegiate Athletic Ass'n. v. Board of Regents of Univ. of Okla., 104 S. Ct. 2948 (1984). Prior to granting certiorari, the Supreme Court granted a temporary stay of the court of appeals and district court rulings. 463 U.S. 1311 (1983). This stay allowed the NCAA television plan to remain in effect for the 1983 football season.

73. It is important to note that football, baseball, basketball and hockey leagues are permitted to pool broadcasting rights without fear of prosecution under antitrust laws. This exemption is granted by the Sports Broadcast Act of 1961, 15 U.S.C. §§ 1291-95 (1982). The Act does not grant exemptions to intercollegiate athletics. 15 U.S.C. § 1293.

74. National Collegiate Athletic Ass'n. v. Board of Regents of Univ. of Okla., 104 S. Ct. 2948, 2959. The Court stated that the NCAA consisted of schools that competed against each other for fans and revenue. With this conclusion, the Court in effect affirmed the lower court's finding that the relevant market was televised college football.

75. *Id.* at 2960. The district court determined that the NCAA's "recommended price" operated in effect to preclude any negotiations as to amount paid per broadcast. Board of Regents v. NCAA, 546 F. Supp. 1276, 1291.

76. Board of Regents v. NCAA, 104 S. Ct. at 2960-61. The Court also noted that "[w]hile as the guardian of an important American tradition, the NCAA's motive must be accorded a respectful presumption of validity, it is nevertheless well-settled that good motives will not validate an otherwise anticompetitive practice." *Id.* at 2960 n.23.

77. *Id.* at 2966. See also Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Ass'n., 735 F.2d 577 (D.C. Cir. 1984) (challenge to NCAA's formerly all-male dues policy and proceed distribution formula); Hennessey v. National Collegiate Athletic Ass'n., 564 F.2d 1136 (5th Cir. 1977) (NCAA rules regarding coaching staff size held valid); Justice v. National

regulations, the Court found that the NCAA performed a service which actually expanded the choice available to both consumers (the sports fan) and the athletes, and hence could be viewed as procompetitive.⁷⁸ In determining whether the controversial television plan achieved those goals, the Court noted that the inquiry, which was the same under both rules, was whether the challenged restraint enhanced competition.⁷⁹

THE MAJORITY'S REASONING

After deciding which rule to apply, the Court turned to an examination of the NCAA's justifications for the apparent anticompetitive effect⁸⁰ of the television plan. The NCAA argued that the plan could have no anticompetitive effect because it had no market power through which it could alter the interaction of supply and demand.⁸¹ In rejecting this argument, the Court stated that as a matter of law, absence of market power does not justify a naked restraint on price and output;⁸² price and supply must still be responsive to consumer demand.⁸³ It was also found, as a matter of fact, that the NCAA possessed market power, in that it controlled a separate unique market—college football broadcasts—which attracted a unique audience that would not be drawn to other forms of entertainment.⁸⁴

The NCAA's argument, that its plan was the result of a joint venture agreement between the individual members, and therefore was procompetitive because it assisted in the marketing of broadcast rights, was also rejected.⁸⁵ The NCAA's plan was distinguished from the licensing arrangement in *Broadcast Music Inc. v. Columbia Broadcasting*⁸⁶ because the Court found that the NCAA's plan did not create a new product, it merely assured that the same product (broadcast rights) was

Collegiate Athletic Ass'n., 577 F. Supp. 356 (D. Ariz. 1983) (sanctions on basis of violation of NCAA rules not a violation of antitrust laws or constitution); *Jones v. National Collegiate Athletic Ass'n.*, 392 F. Supp. 295 (D. Mass. 1975).

78. *Board of Regents v. NCAA*, 104 S.Ct. at 2961.

79. *Id.* at 2962.

80. The Court determined that the NCAA's plan was apparently anticompetitive because it raised prices, limited output and was unresponsive to consumer demand. *Id.*

81. Market power is also defined as the ability to raise prices above what would be charged in a competitive market. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S.Ct. 1551, 1556 n.16 (1984); *United States Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610 (1977); *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 391 (1956).

82. *Board of Regents v. NCAA*, 104 S. Ct. at 2965.

83. *Id.*

84. The Court found, as had the district court, that the audience was unique in demographics as well. *Id.* at 2966.

85. *Id.* at 2967.

86. 441 U.S. 1 (1979).

sold in a noncompetitive market.⁸⁷ The Court stated that if the NCAA's television plan indeed produced procompetitive efficiencies, the plan would have increased output and reduced the price of broadcast rights to televised games.⁸⁸ The conclusion reached by the Court was that because no individual school was permitted to broadcast its own games without restraint, production was therefore limited, which was an anticompetitive result.⁸⁹

The NCAA's argument, that the television plan protected live attendance at games, was addressed next. The majority doubted that this claim was in fact true because the games were broadcast at the same time they were played.⁹⁰ It was also noted that the NCAA's argument appeared to be based on the fear that "the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games."⁹¹ The Court held that this justification is therefore inconsistent with the policies of the Sherman Act because the Rule of Reason does not support the defense that competition itself is unreasonable.⁹² Finally, the Court rejected the NCAA's contention that the plan was necessary to maintain a competitive balance between member schools.⁹³ It found that this justification was not related to any neutral standard and that there was no evidence that the plan was tailored to serve such an interest.⁹⁴

THE DISSENT'S REASONING

In his dissent,⁹⁵ Justice White⁹⁶ stated that the Court erred in treating intercollegiate football as a "purely commercial venture" and ignoring the NCAA's interests in preserving amateurism and integrating athletics and education.⁹⁷ Justice White stated that although the district court and the Supreme Court correctly chose the Rule of Reason test,

87. Board of Regents v. NCAA, 104 S. Ct. at 2967.

88. *Id.*

89. *Id.*

90. *Id.* at 2969.

91. *Id.*

92. *Id.*, citing National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978).

93. Board of Regents v. NCAA, at 2970.

94. *Id.*

95. *Id.* at 2971-79 (White, and Rehnquist, J.J., dissenting).

96. It is interesting to note that Justice White, prior to his distinguished career on the bench, enjoyed a distinguished football career as well. In 1937, Justice White (who was known then as "Whizzer White") led the nation in rushing for the University of Colorado and was named an All-American. In 1938, Justice White played professional football for the Pittsburgh Pirates (the predecessors of the Steelers) and was voted NFL rookie of the year. See B. Woodward and S. Armstrong, *THE BRETHREN* 65 (1979).

97. Board of Regents v. NCAA, 104 S. Ct. at 2973.

they employed the wrong measure of output.⁹⁸ Under the plan, Justice White pointed out, *total viewership* is actually increased by expanding national network coverage at the expense of limiting the number of local broadcasts. Justice White also argued that the plan created a new product, exclusive television rights, which were more valuable and therefore commanded a higher price than the individual schools, marketing their products, could demand.⁹⁹ This, in White's opinion, was not an anticompetitive rise in price.

Justice White further argued that the redistribution of revenues was necessary to maintain a system of "truly competitive teams."¹⁰⁰ In addition, Justice White contended that the plan passed muster under the Rule of Reason. Although he agreed with the majority that intercollegiate football was a unique product, Justice White criticized the majority's failure to recognize that the NCAA's television plan, as a joint venture, helped college football as a whole to compete with other forms of entertainment.¹⁰¹ In that respect, Justice White concluded that the plan merely regulated and thereby promoted competition.¹⁰²

Finally, Justice White reiterated what he found to be the majority's main error in its decision—the failure to recognize the legitimate non-economic goals of the NCAA and its members.¹⁰³ Justice White stated, "[W]hen these values are factored into the balance, the NCAA's television plan seems eminently reasonable."¹⁰⁴ For these reasons, Justice White concluded that at the very least, the district court's injunction be vacated and the NCAA be allowed to regulate its member's football game broadcasts.¹⁰⁵

ANALYSIS

Although the Court purported to apply the Rule of Reason analysis in its decision, it actually applied a narrower test which approached the mode of analysis used under the *per se* rule. Instead of determining whether the net effect¹⁰⁶ of the challenged restraint enhanced competition, the Court instead concentrated only on output and price, thereby

98. *Id.* Essentially, Justice White argued that if the number of televised games were to increase, viewership would either decrease or remain the same.

99. *Id.* at 2976.

100. *Id.*

101. *Id.*

102. *Id.* at 2977.

103. *Id.*

104. *Id.* at 2978.

105. *Id.* at 2979.

106. See *North Am. Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir. 1981), *cert. denied*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari).

concluding the television plan was anticompetitive.¹⁰⁷

Although inquiry under the modern interpretation of the Rule of Reason is limited to the competitive impact of the challenged restraint,¹⁰⁸ various other factors, such as market power,¹⁰⁹ effect of the restraint upon competitive market conditions¹¹⁰ and the nature of the restraint¹¹¹ must be considered before an evaluation of the competitive impact of the practice can be made.¹¹² While the Court in *NCAA v. Board of Regents* attempted to discuss each of these factors in detail, it failed to go on to the next step and evaluate, as a whole, what relevance these factors have on competition. Instead, the Court refrained from any further analysis of these factors, and chose to conclude, simplistically, that the plan was not procompetitive because it limited output and raised prices.¹¹³

This Rule of Reason analysis appears to suspiciously resemble the *per se* analysis used in *Arizona v. Maricopa County*.¹¹⁴ The Court even alluded to the fact that its reasoning under the Rule of Reason was similar to reasoning under the *per se* rule. In a footnote, the Court stated, "[I]ndeed there is often no bright line separating *per se* from Rule of Reason analysis. *Per se* rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."¹¹⁵ Utilizing this interpretation of the Rule of Reason in *NCAA v. Board of Regents*, the Court seems to be continuing a trend of attempting to merge the two lines of analyses.

The Court, in considering the NCAA's justification for the apparent anticompetitive effects of the television plan, also relied too heavily upon the district court findings in regard to its interpretation of the relevant market. Under a Rule of Reason analysis, it is imperative to determine the relevant market correctly before determining the effects of a challenged restraint upon it.¹¹⁶ The Court accepted the district court's find-

107. Some restraints are so restrictive on their face that further analysis is unnecessary. See, e.g., *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551 (1984); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982); *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977). However, the Court determined that it was necessary to examine the procompetitive justifications in *NCAA v. Board of Regents*, 104 S. Ct. 2948 (1984).

108. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

109. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 104 S. Ct. 1551, 1566 (1984).

110. *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977).

111. *Id.*

112. *Continental T.V., Inc. v. G.T.E. Sylvania, Inc.*, 433 U.S. 36 (1977); *United States v. Topco Assocs.*, 405 U.S. 596, 607 (1972); *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918); *Mackey v. National Football League*, 543 F.2d 606, 620 (8th Cir. 1976).

113. *NCAA v. Board of Regents*, 104 S. Ct. at 2967.

114. 457 U.S. 332 (1982). See *supra* notes 68-73 and accompanying text.

115. *NCAA v. Board of Regents*, 104 S. Ct. at 2962 n.26.

116. See *Antitrust Law Developments*, *supra* note 17 at 16.

ing that college football broadcasts constitute a separate market because there is no available substitute for televised college football games.¹¹⁷ The district court based its conclusion on statistics which showed that the demographics of an audience that watched college football games was unique and, consequently, the court concluded that advertisers would pay a premium price to reach this audience.¹¹⁸

In accepting the district court's findings, the Court ignored the role of televised college football in an entertainment market.¹¹⁹ As the dissent pointed out, the NCAA has no monopoly power when it is viewed as a competitor against other forms of entertainment.¹²⁰ Justice White stated, "[I]t is one thing to say that 'NCAA football is a unique product'. . . . It is quite another . . . to say that maintenance or enhancement of the quality of NCAA football telecasts is unnecessary to enable those telecasts to compete effectively against other forms of entertainment."¹²¹ It appears that the Court, by overlooking the role college football played as a competitor in the entertainment market, failed to thoroughly examine the market impact of the NCAA's plan as required under a traditional Rule of Reason approach.¹²²

It also appears that the Court failed to adequately distinguish the NCAA's television plan from the blanket licensing arrangement for musical compositions in *Broadcast Music*.¹²³ The Court in *Broadcast Music* held that the licensing arrangement did not violate antitrust laws because it created a "different product" that allowed for the effective marketing of a product that otherwise would be unavailable.¹²⁴ The Court stated that the NCAA's television plan differed from the permissible arrangement in *Broadcast Music* because it did not "make possible a new product by reaping otherwise unattainable efficiencies."¹²⁵ Rather, the NCAA's plan, merely sold the same rights in a non-competitive market.¹²⁶ It was also found that unlike the plan in *Broadcast Music*, the television plan limited output and increased the price of televised games,¹²⁷ and was therefore anticompetitive.

117. NCAA v. Board of Regents, 104 S. Ct. 2948, 2961 (1984).

118. Board of Regents v. NCAA, 546 F. Supp. at 1297-98, *passim*.

119. See North Am. Soccer League v. National Football League, 670 F.2d 1249, *cert. denied*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari).

120. NCAA v. Board of Regents, 104 S. Ct. at 2977 (White, J., dissenting).

121. *Id.*

122. See National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679, 690 (1978).

123. 441 U.S. 1 (1979).

124. *Id.* at 22.

125. NCAA v. Board of Regents, 104 S. Ct. at 2967, *citing*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982).

126. NCAA v. Board of Regents, 104 S. Ct. at 2967.

127. *Id.*

The Court, however, overlooked the persuasiveness of the argument that the NCAA's plan, as did the plan in *Broadcast Music*, created a new product. It can be effectively argued that the NCAA's plan created a new product of exclusive television rights. The fact that the NCAA's plan resulted in higher prices for these exclusive rights was not indicative of the plan's anticompetitive nature.¹²⁸ The Court indicated in *Broadcast Music* that joint ventures and other cooperative arrangements were not usually unlawful, at least not as price-fixing schemes, where the agreement on price was necessary in order to market the product.¹²⁹ The Court recognized in *NCAA v. Board of Regents* that some degree of cooperation was necessary if the market was to be preserved.¹³⁰ However, the conclusion that the NCAA plan was anticompetitive¹³¹ ignored the argument that the limit on the number of televised games and price restrictions enhanced the quality of the product produced, and thereby potentially increased viewership.¹³²

Finally, the Court's argument that the restraints imposed by the NCAA were not necessary to preserve the market and to make the product available appears to be internally inconsistent. The majority recognized that some horizontal restraints¹³³ were necessary in order to preserve the amateur character of intercollegiate sports. It has been decided many times in the past that NCAA regulations concerning eligibility,¹³⁴ recruiting,¹³⁵ coaching contracts¹³⁶ and standards of amateurism¹³⁷ do not violate antitrust laws.¹³⁸ However, while the majority maintained that these type of regulations were procompetitive, it failed to adequately distinguish why the regulations concerning television broadcasting rights do not pass muster under antitrust laws. Although these non-economic types of restrictions also arguably had the effect of limiting output by placing restraints on competition,¹³⁹ the Court appeared to apply a different standard in considering the legality of the NCAA's noneconomic regulations than it did when considering the NCAA's broadcast plan.

128. See *id.* at 2976.

129. *Broadcast Music*, 441 U.S. at 23.

130. *Board of Regents v. NCAA*, 104 S. Ct. at 2969.

131. *Id.* at 2970.

132. *Id.* at 2976 (White, J., dissenting). See also *National Football League v. North Am. Soccer League*, 459 U.S. 1074 (1982) (Rehnquist, J., dissenting from denial of certiorari).

133. *NCAA v. Board of Regents*, 104 S. Ct. at 2961.

134. *Kupec v. Atlantic Coast Conference*, 399 F. Supp. 1377 (M.D.N.C. 1975).

135. See *Justice v. National Collegiate Athletic Ass'n*, 577 F. Supp. 356, 379 (D. Ariz. 1983).

136. *Hennessy v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir. 1977).

137. *Jones v. National Collegiate Athletic Ass'n*, 392 F. Supp. 295 (D. Mass. 1975).

138. See *supra* note 77.

139. *NCAA v. Board of Regents*, 104 S. Ct. at 2976 (White, J., dissenting).

In analyzing the possible procompetitive effects of the NCAA's plan, the Court failed to adequately discuss, in its Rule of Reason analysis, the noneconomic justifications for the limitations on output and price. The fact that the NCAA is a not-for-profit organization was not taken into consideration. The characterization of the NCAA as a not-for-profit educational institution as opposed to a business entity, while not determinative, is relevant in determining whether that particular restraint violates the Sherman Act.¹⁴⁰ One of the most persuasive arguments made by the NCAA was that the plan maintains the competitive balance between teams by spreading television revenues among strong and weak teams alike¹⁴¹ thereby fostering the goal of amateurism by reducing financial incentives. The Court rejected this argument by stating that the notion that "competition itself is unreasonable" is inconsistent with the goals of the Sherman Act.¹⁴² What may be true in a business setting may not necessarily be true when a not-for-profit organization is involved. By failing to take into consideration the NCAA's non-economic goals, the Court failed to utilize the full scope of the inquiry available under the Rule of Reason.

CONCLUSION

The Court's decision in *NCAA v. Board of Regents* leaves the NCAA's member colleges and universities scrambling for television rights and broadcast dollars. Although the big winner in this process is the college football fan, in that the number of college football games televised has increased substantially, the schools in the end may suffer. The immediate losers will be the schools with weaker football teams and those smaller schools in Divisions II and III. According to recent reports, total television revenues for intercollegiate football for the 1984 season are expected to be much lower than the original estimates. This drop in revenues may result in a realization of the fears expressed in Justice White's dissent—that uninhibited competition will undermine the NCAA's goals of preserving amateurism and promoting athletics within the educational system.¹⁴³

The Court's decision creates other problems as well. Legal disputes

140. See *Community Communications Co. v. City of Boulder, Colo.*, 455 U.S. 40 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

141. The NCAA also distributes the revenues it earns from its television plan to Division II and Division III teams to help maintain their programs and also to fund other sports and tournaments. *NCAA v. Board of Regents*, 104 S. Ct. 2948, 2970 (1984).

142. *NCAA v. Board of Regents*, 104 S. Ct. at 2969.

143. *Id.* at 2978 (White, J., dissenting).

have already arisen over which of two teams, meeting on the playing field with conflicting television contracts, have the right to broadcast the game.¹⁴⁴ The decision also leaves the NCAA in the dark as to the legality of its non-economic regulations in the areas of eligibility, recruiting and others. It appears that although the Court approved of these types of regulations, a valid argument can be made based on *NCAA v. Board of Regents* that these restrictions limit output and raise prices and therefore violate Section 1 of the Sherman Act.

In a broader sense, the Court's decision in *NCAA v. Board of Regents* appears to further merge the doctrines of *per se* and Rule of Reason antitrust analysis. Although the Court goes beyond the face of the restraints imposed by the NCAA, it failed to fully examine the procompetitive justifications as required under a traditional Rule of Reason approach. It appears that the Court in this decision is continuing a trend toward combining the two methods of analysis into one rule.

144. See Chicago Tribune, Sept. 10, 1984. § 3, at 1.

